

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 04-CV-12249-DPW

HARVARD REAL ESTATE-ALLSTON, INC.,)
Plaintiff,)
v.)
KMART CORPORATION, KMART STORE 9424,)
Defendant.)

**AFFIDAVIT OF PLAINTIFF'S COUNSEL IN REGARD TO
ATTORNEY'S FEES AND COSTS**

We, Frank A. Flynn, Esquire, and Randolph C. English, Esquire, of the firm of
Downing & Flynn, 85 Devonshire Street, Suite 1000, Boston, Massachusetts 02109,
having personal knowledge in these regards, do hereby depose and say as follows:

1. The law firm of Downing & Flynn is counsel to Harvard Real Estate-
Allston, Inc., the plaintiff herein.
2. Since October 25, 2004, the date the Defendant filed its Notice of
Removal, Plaintiff's counsel has expended extensive time necessary for the following: to
obtain remand of the Defendant's improper removal of the Plaintiff's state court claim,
and to respond to counterclaims raised by the Defendant. The major areas involved
included the following:

Research substantial federal jurisdictional issues raised by the Notice of Removal;

Preparation of Motion to Remand and substantial Memorandum of Law in
support of Motion to Remand;

Research Defendants' ability to raise counterclaims in federal court where
prohibited in commercial evictions under state law;

Prepare Motion to Dismiss Counterclaims and substantial Memorandum of Law in support of Motion to Dismiss Counterclaims;

Review Defendant's Opposition to Motion to Remand and research numerous issues raised therein;

Review Defendant's Opposition to Motion to Dismiss Counterclaims and research numerous issues raised therein;

Research law and prepare substantial Reply Brief in Support of Motion to Remand;

Research law and prepare substantial Reply Brief in Support of Motion to Dismiss Counterclaims;

Review Defendant's Surreply Re: Motion to Remand and research further law cited therein;

Review Defendant's Surreply Re: Motion to Dismiss Counterclaims and research further law cited therein.

3. Counsel's time, including the time of the lead attorney and associates, in pursuing these matters, which time will shortly be billed to the Plaintiff, is reflected in the attached legal bills detailing a portion of the attorney time involved. Attorneys' time is billed at a rate of \$235.00 per hour, discounted to \$195.00 per hour.

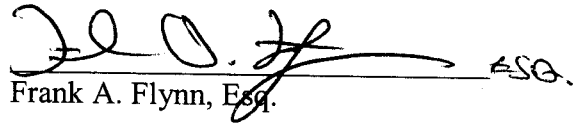
4. The total amount of legal fees as described herein equals \$ 39,882.00.

5. The plaintiff is entitled to its legal fees and costs incurred in pursuing the above-described matters, pursuant to 28 U.S.C. § 1447(c).

6. Counsel believes that the attorney's fees and costs enumerated above and attached hereto are reasonable for all of the matters described above.

7. Copies of the time entries as described above are attached hereto.

SWORN AND SUBSCRIBED to under the pains and penalties of perjury this
Twelfth (12th) day of January, 2005.

 Esq.
Frank A. Flynn, Esq.

 Esq.
Randolph C. English, Esq.

Downing & Flynn
85 Devonshire Street, Suite 1000
Boston, MA 02109
(617)720-3535

January 12, 2005

Harvard University

Invoice #

In Reference To: **K-Mart**

	<u>Hrs/Rate</u>	<u>Amount</u>
<u>Remand Issues</u>		
11/1/2004 Prepare Motion to Remand	3.00	690.00
	230.00/hr	
11/2/2004 Review Answer, Counterclaims and demand for Jury Trial from	1.70	391.00
Attorney Moorman	230.00/hr	
Prepare Motion to Dismiss	2.50	575.00
	230.00/hr	
Research federal case law regarding applicable law	2.00	460.00
	230.00/hr	
11/3/2004 Research case law for Motion to Dismiss Counterclaims	1.50	345.00
	230.00/hr	
Prepare Motion to Dismiss Kmart's Counterclaims	4.00	920.00
	230.00/hr	
Research case law for Motion to Dismiss	1.20	276.00
	230.00/hr	
11/5/2004 Revise Motion to Dismiss	3.00	690.00
	230.00/hr	
11/9/2004 Research federal case law regarding jurisdiction and related issues	2.50	575.00
	230.00/hr	
Prepare Motion to Remand to State Court	2.50	575.00
	230.00/hr	

Harvard University

In Reference to: K-Mart

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
11/10/2004 Revise Motion to Dismiss	5.00	1,150.00
Research federal removal issues related to bankruptcy	230.00/hr	
	0.80	184.00
Prepare Motion to Remand	230.00/hr	
	1.50	345.00
11/11/2004 Revise Memorandum in Support of Motion to Remand	230.00/hr	
	4.50	1,035.00
11/12/2004 Revise Memorandum in Support of Motion to Remand	230.00/hr	
	6.50	1,495.00
11/15/2004 Review and revise Motion to Strike/Dismiss Counterclaims	230.00/hr	
	0.80	184.00
Review and revise Memorandum of Law in suport of Motion to Strike/Dismiss Counterclaims	230.00/hr	
	1.50	345.00
Prepare Motion to Remand	230.00/hr	
	4.50	1,035.00
Revise Motion to Remand	230.00/hr	
	1.00	230.00
11/16/2004 Review and revise memorandum of law in support of Motion to Strike Counterclaims	230.00/hr	
	1.30	299.00
Review and revise memorandum of law supporting Motion to Strike Counterclaims	230.00/hr	
	1.50	345.00
Review Motion to Dismiss Cournterclaims	230.00/hr	
	1.00	230.00
Revise Motion to Dismis Counterclaims	230.00/hr	
	3.00	690.00
11/17/2004 Revise Motion to Dismiss	230.00/hr	
	9.00	2,070.00
11/18/2004 Review Motion to Dismiss	230.00/hr	
	1.00	230.00
Revise Motion to Dismiss	230.00/hr	
	0.50	115.00
11/19/2004 Review and revise Motion to Dismiss Kmart's Counterclaims	230.00/hr	
	2.30	529.00
Review and revise memorandum of law in support of Motion to Dismiss	230.00/hr	
	1.60	368.00
Revise Memorandum in Support of Motion to Dismiss	230.00/hr	
	2.50	575.00
	230.00/hr	

Harvard University

In Reference to: K-Mart

Page 3

	<u>Hrs/Rate</u>	<u>Amount</u>
11/19/2004 Revise Motion to Dismiss	1.30	299.00
	230.00/hr	
11/21/2004 Review and revise memorandum of law in support of Motion to Remand	1.70	391.00
	230.00/hr	
11/22/2004 Review and revise Motion to Dismiss Counterclaims and supporting memorandum of law	1.80	414.00
	230.00/hr	
Review and revise Motion to Remand	0.80	184.00
	230.00/hr	
Review and revise memorandum of law in support of Motion to Remand	1.30	299.00
	230.00/hr	
Revise memorandum Motion to Dismiss	2.50	575.00
	230.00/hr	
Research additional federal case law regarding pending duplicative litigation	0.80	184.00
	230.00/hr	
Revise statement of facts for Motion to Dismiss	1.00	230.00
	230.00/hr	
Prepare exhibits for Motion to Dismiss	0.70	161.00
	230.00/hr	
Revise memorandum for Motion to Dismiss	0.80	184.00
	230.00/hr	
Revise Motion to Dismiss	0.70	161.00
	230.00/hr	
11/23/2004 Review and revise memorandum of law in support of Motion to Remand to State Court	1.60	368.00
	230.00/hr	
Review and revise Motion to Remand to State Court	0.90	207.00
	230.00/hr	
Research federal case law strictly constructing removal statute	1.00	230.00
	230.00/hr	
Prepare Memorandum in Support of Motion to Remand to State Court	4.00	920.00
	230.00/hr	
Research federal law for Memorandum in Support of Motion to Remand	1.50	345.00
	230.00/hr	
Revise Memorandum in Support of Motion to Remand	2.00	460.00
	230.00/hr	
11/24/2004 Revise Memorandum in Support of Motion to Remand	2.00	460.00
	230.00/hr	
Revise Memorandum in Support of Motion to Remand	0.70	161.00
	230.00/hr	

Harvard University

In Reference to: K-Mart

Page 4

	<u>Hrs/Rate</u>	<u>Amount</u>
12/3/2004 Research case law regarding claim preclusion	2.50	575.00
	230.00/hr	
Research remand and removal issues for Reply Brief	2.70	621.00
	230.00/hr	
12/16/2004 Review Defendant's Opposition to Motion to Remand	1.30	299.00
	230.00/hr	
12/17/2004 Review Kmart's Opposition to Motion to Dismiss	1.20	276.00
	230.00/hr	
Research law regarding state court's authority to determine effect of bankruptcy court's orders	1.00	230.00
	230.00/hr	
Research additional issues regarding federal question jurisdiction	1.50	345.00
	230.00/hr	
12/18/2004 Research issues raised by Defendant's Opposition to Motion to Remand	2.00	460.00
	230.00/hr	
Prepare Reply Brief regarding Motion to Remand	3.50	805.00
	230.00/hr	
12/19/2004 Prepare Harvard's Reply Brief regarding Motion to Remand	5.00	1,150.00
	230.00/hr	
12/20/2004 Revise Reply Brief regarding Motion to Remand	1.50	345.00
	230.00/hr	
Research issue regarding injunctive relief versus recovery of possession	0.50	115.00
	230.00/hr	
1/2/2005 Research issues regarding substantive versus procedural law in federal diversity cases	2.50	575.00
	230.00/hr	
1/3/2005 Revise Reply regarding Motion to Remand	4.00	920.00
	230.00/hr	
1/4/2005 Review and revise Reply Brief regarding Remand Motion	1.80	414.00
	230.00/hr	
Review Kmart Opposition Brief regarding Remand Motion	0.90	207.00
	230.00/hr	
Prepare Reply Brief regarding Motion to Dismiss Counterclaims	1.50	345.00
	230.00/hr	
Research issues regarding public policy of summary process statute	1.00	230.00
	230.00/hr	
Review Reply Brief regarding Motion to Remand	0.80	184.00
	230.00/hr	
Research case law regarding post-confirmation lease violations	0.60	138.00
	230.00/hr	

Harvard University

In Reference to: K-Mart

Page 5

	<u>Hrs/Rate</u>	<u>Amount</u>
1/4/2005 Research additional federal case law regarding removal and remand	1.50 230.00/hr	345.00
Revise Reply Brief regarding Motion to Remand	2.50 230.00/hr	575.00
1/5/2005 Revise Reply Brief regarding Motion to Remand	2.50 230.00/hr	575.00
1/6/2005 Review and revise reply brief regarding remand	1.60 230.00/hr	368.00
Review federal remanded summary process cases	1.40 230.00/hr	322.00
Review and revise reply brief regarding remand motion	1.60 230.00/hr	368.00
Review and revise reply brief regarding Motion to Dismiss Counterclaims	2.30 230.00/hr	529.00
Revise Reply Brief regarding Motion	3.50 230.00/hr	805.00
Research cases cited by Kmart regarding compulsory counterclaims under federal rules	0.80 230.00/hr	184.00
Additional research of federal case law for Reply Brief	1.50 230.00/hr	345.00
Revise Reply Brief	0.80 230.00/hr	184.00
Revise Reply Brief regarding Motion to Remand	3.00 230.00/hr	690.00
Review and revise Reply Brief regarding Motion to Dismiss	2.00 230.00/hr	460.00
Revise Reply Brief regarding Remand Motion	0.80 230.00/hr	184.00
Research substantive versus procedural law	1.00 230.00/hr	230.00
1/7/2005 Review and revise reply brief regarding Motion to Remand	1.60 230.00/hr	368.00
Conference with Associate regarding revisions	0.70 230.00/hr	161.00
Review and revise reply brief regarding Motion to Dismiss Counterclaims	1.70 230.00/hr	391.00
Revise Reply Brief regarding Motion to Remand	2.30 230.00/hr	529.00

Harvard University

In Reference to: K-Mart

Page 6

	<u>Hrs/Rate</u>	<u>Amount</u>
1/7/2005 Revise Reply Brief regarding Motion to Dismiss Counterclaims	0.70 230.00/hr	161.00
Revise Reply Brief regarding remand	0.50 230.00/hr	115.00
Revise Reply Brief regarding Motion to Dismiss	0.50 230.00/hr	115.00
Prepare exhibits to Reply Brief	0.40 230.00/hr	92.00
Research regarding Equitable Remedies as applicable to summary process case	0.60 230.00/hr	138.00
1/9/2005 Review removal petition and Motion to Remand regarding scheduling conference preparation	2.30 230.00/hr	529.00
Prepare for Hearing on Harvard's Motion to Remand and Motion to Dismiss Counterclaims; research of federal law regarding removal jurisdiction	2.50 230.00/hr	575.00
Prepare outline of all issues for oral argument	2.50 230.00/hr	575.00
1/10/2005 Review Kmart Opposition to Remand Motion	1.70 230.00/hr	391.00
Review Reply Brief and cases regarding Remand	1.40 230.00/hr	322.00
Review sur-reply by Kmart regarding Remand	0.90 230.00/hr	207.00
Review sur-reply by Kmart regarding Dismissal of Counterclaims	0.80 230.00/hr	184.00
Review memorandum of Associate regarding Remand	0.70 230.00/hr	161.00
Review memorandum of Associate and cases regarding Dismissal of Counterclaims	1.60 230.00/hr	368.00
Prepare outline for Hearing argument regarding Motion to Remand	2.50 230.00/hr	575.00
Research additional case law for argument on Motion to Remand	1.50 230.00/hr	345.00
Revise outline for Hearing on Remand Motion	0.70 230.00/hr	161.00
Prepare outline for Hearing on Motion to Dismiss Counterclaims	2.50 230.00/hr	575.00
Review Kmart sur-reply regarding Motion to Remand	0.70 230.00/hr	161.00

Harvard University

In Reference to: K-Mart

Page 7

	<u>Hrs/Rate</u>	<u>Amount</u>
1/10/2005 Review Kmart's sur-reply regarding Motion to Dismiss	0.50	115.00
Counterclaims	230.00/hr	
Research cases cited in Kmart's sur-replies	0.70	161.00
	230.00/hr	
1/11/2005 Preparation for U.S. District Court Hearing regarding Remand and	3.50	805.00
Dismissal of Counterclaims issue	230.00/hr	
Attendance at scheduling conference and Hearing regarding	1.60	368.00
Motion to Remand	230.00/hr	
Prepare for Hearing on Motion to Remand and Motion to Dismiss	3.00	690.00
	230.00/hr	
SUBTOTAL:	[204.00	46,920.00]
Subtotal of charges		\$46,920.00
15% Courtesy Discount		(\$7,038.00)
Total Legal Services Rendered	204.00	\$39,882.00